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September 17, 2021

BY ECF and EMAIL

Hon. Mark W. Pedersen
United States Magistrate Judge
Western District of New York
100 State Street
Rochester, New York 14614
pedersen@nywd.uscourts.gov

Re: *Wishart v. Welkley et al.*, Case No. 19-cv-6189 (DGL) (MJP)

Your Honor,

We write as Plaintiff's counsel to supplement the Itemized Bill of Costs that Plaintiff submitted on February 8, 2021 (ECF No. 84) pursuant to the Court's January 29, 2021 Decision & Order (ECF No. 83). That Decision & Order granted Plaintiff's motion for sanctions for Defendants' mishandling of e-discovery and "direct[ed] Defendants to pay the reasonable costs for litigating this e-discovery issue" (ECF No. 83 at 8). In his Bill of Costs, Plaintiff asked the Court to award a rate of \$300 per hour for Plaintiff's counsel's work (ECF No. 84 at 4). Plaintiff asked for that rate based on an assumption that the Court would apply in-district rates because the Court's previous order granting an earlier round of sanctions applied in-district rates (*see* ECF Doc. 57). In light of the Court's September 15, 2021 Decision and Order in *Casaccia v. City of Rochester*, No. 17-CV-6323-FPG-MJP, we now ask the Court to award out-of-district rates and award Plaintiff's counsel the same rate awarded to plaintiff's counsel in *Casaccia*, that is, \$475 per hour.

The reasons that the Court gave for awarding out-of-district rates in *Casaccia* are equally applicable here. Plaintiff's counsel here have both worked with Elliot Shields and can attest to his dogged litigation efforts. Mr. Moskovitz is presently co-counsel with Mr. Shields in a major class action brought against the City of Rochester, *Hall v. Warren*, No. 21-CV-06296-FPG (W.D.N.Y.), and Mr. Rickner is litigating a major wrongful conviction case in this Court, *Epps v. Buffalo*, No. 19-CV-00281 (W.D.N.Y.). The efforts required of Plaintiff's counsel to expose the Defendants' mishandling of e-discovery in this case are similar to the efforts of Mr. Shields to locate *Monell* discovery in *Casaccia*. Like the 150+ hours that Mr. Shields expended in *Casaccia*, Plaintiff's counsel here spent more than 15 months and more than 200 hours litigating the e-discovery issue in this case (*see* ECF No. 84 at 2-3; ECF Nos. 84-1 & 84-2).

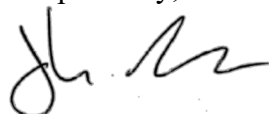
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This demonstrates why Plaintiff made a “reasonable decision to retain out-of-district counsel,” *Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cnty. of Albany*, 522 F.3d 182, 183 (2d Cir. 2007). There are no other examples we could find of a plaintiff’s counsel in this district pushing so vigorously to obtain e-discovery in a prisoner abuse civil rights case. *See also* ECF No. 58-4 ¶ 8 (Decl. of Elliot Shields) (“there is a substantial shortage of civil rights attorneys who will handle prisoner-related claims in the Western District of New York”). Nor was the issue of e-discovery straightforward, and the difficulties it entailed were compounded by the inaccurate information repeatedly provided by Defendants to counsel and the Court. Litigating this issue required specialized knowledge, experience, and persistence – which justifies a higher hourly rate. *See Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 176 (2d Cir. 2009). Finally, the experience of Plaintiff’s counsel in this case is similar to (and in terms of years’ of experience, greater than) that of Mr. Shields. *See* ECF No. 57 (Decl. of Joshua Moskovitz); ECF No. 58 (Decl. of Rob Rickner); ECF No. 58-4 (Decl. of Elliot Shields in support of counsel’s fee application).

Accordingly, we ask the Court to award counsel here an hourly rate of \$475 on Plaintiff’s pending Itemized Bill of Costs (ECF No. 84). We appreciate the Court’s time and attention to this matter.

Respectfully,

Joshua S. Moskovitz
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cc: Hillel Deutsch (by ECF)